The Human Rights Code, R.S.O. 1990, C.H. 19

In The Matter Of the Complaint of Muriel Thorne dated May 18, 1990, against Emerson Electric Canada Ltd., and United Electrical, Radio and Machine Workers of Canada, Local 522

Before: Deborah J. Leighton
A Board of Inquiry

Appearances: Anthony Griffin, for the Ontario Human Rights Commission;

The Complainant in person;

Caroline Rowan, for Emerson Electric Canada Ltd.; and

W. M. Woodbeck, for United Electrical, Radio and Machine Workers of Canada, Local 522

Place: Kingston, Ontario

Date: November 16, 1992

Preliminary Matters

On October 19, 1992, I was appointed to act as a Board of Inquiry to hear and decide the complaint of Ms. Muriel Thorne alleging discrimination in employment because of handicap against Electric Canada Inc. (the "Company") and United Electrical, Radio and Machine Workers of Canada, Local 522 (the "Union").

A Hearing was held on this matter on November 16, 1992 in Kingston, Ontario. At the beginning of the Hearing counsel for the Commission and counsel for the Respondent Company requested that Mr. Ed Boone, a named Respondent, be removed from the proceedings. Both counsels indicated their consent to an Order of the Board amending the complaint to remove Mr. Ed Boone and an Order to this effect was made at that time.

Counsel for the Respondent then made the following preliminary objection: Counsel for the Respondent Company made a motion that the complaint be dismissed due to delay in bringing the complaint. The delay in bringing the complaint was between March 12, 1986 when Ms. Thorne was advised of the change in her seniority start date and the date of her complaint which was May 18, 1990. Counsel argued that it would be an abuse of power pursuant to Section 23 of the Statutory Powers and Procedures Act R.S.O. 1990 C.S. 22 ("S.P.P.A."), if the Board was to hear the complaint on its merits. She argued further that the Company Respondent had relied to its detriment on Ms. Thorne's inaction between March 12, 1986 and May 18, 1990.

Counsel cited Gohm V Domtar Inc. (1989), 10 C.H.R.R. D/5968, as authority that a Board may dismiss for delay in processing a complaint. In explaining her argument for detrimental reliance Counsel stated that in 1986 the seniority list was changed and Ms. Thorne lost six months of seniority. Four people moved ahead of her in the ranks. The Company relied on this change when

they ran a competition in 1990 and appointed a new person to a job. It is conceded that Ms. Thorne would have got this job had her seniority not been changed. Counsel for the Respondent also conceded that there was no problem in hearing this case, that is, the delay had not caused prejudice in terms of putting in a defence.

Counsel for the Commission argued that there was a continuing discrimination here and that there was insufficient prejudice to support a dismissal under Section 23 of the S.P.P.A. Counsel argued further that any delay that was unreasonable should affect the remedy. Counsel for the Commission cited Janssen v Ontario (Milk Marketing Board) (1990), 13 C.H.R.R. D/397 (Ont. B.O.I.) as a case with similar facts to this one. In that case the complainant's cause of action began in 1981 but no Human Rights Complaint was made until 1984. Counsel for the Respondents in that case argued that there had been economic prejudice because of the delay. The Board did not dismiss on the basis that there had been any prejudice. However, when granting damages, the Board held that the Order operated prospectively not retroactively and accordingly no compensation was awarded to the complainant.

Boards of Inquiry have jurisdiction under Section 23(1) of the S.P.P.A. to decide whether a complaint should be stayed or dismissed for delay. Gohm v Domtar Inc.; Latif v Ontario Human Rights Commission (unreported, Ont. Div. Ct., March 11, 1992). The jurisprudence on delay indicates that:

> "while unreasonable delay might be a factor to be taken into account in refusing or fashioning a remedy... or in weighing the persuasive force or credibility of testimony or other evidence, delay in initiating or proceeding or processing a complaint should not be considered a basis for dismissing a complaint at the outset of the proceedings before a Board of Inquiry unless it has given rise to a situation in which the Board of

> Inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the Code has occurred." Hyman v Southam Murray Printing Limited ([1981], 3 C.H.R.R. D/617 at D/64, para 5619).

The jurisprudence in this area further indicates that there are two distinct bases for dismissal because of delay. The delay occasioned must make the inquiry into the matter impossible or the delay must prejudice a party in its ability to present a defence and therefore result in an abuse of process; Morin v Noranda Inc. (1988), 9 C.H.R.R. D/5245.); Munsch v York Condominium Corporation No. 60 et al (unreported, Ont. B.O.I. June 30, 1992).

At the Hearing I decided to hear the evidence before deciding Respondent counsel's motion for dismissal because of delay. Respondent counsel did not put evidence in to support a finding that it would be impossible for the Board to proceed with the Hearing. In fact, as noted above, Respondent counsel conceded that there would be no difficulty in presenting the case for the Company and there was insufficient evidence to support a finding of prejudice. Therefore, I find that while there was delay between the change of Ms. Thorne's seniority date and the date of her complaint, there was sufficient evidence for me to be able to hear and consider the matter fairly. Thus, the motion to dismiss is denied.

As a final preliminary matter, I would note that a representative of the Respondent Union attended on behalf of the Union but put in no evidence and made no submissions.

Evidence

Counsel for the Commission and counsel for the Respondent Company submitted the following agreed Statement of Facts:

1. The complainant, Muriel Thorne, has been employed by Emerson Electric Canada Ltd. (hereinafter called "the Company") and its predecessors since May 20, 1969. The complainant is currently employed as a Quality Control Inspector.

2. The complainant sustained an injury at work on or about January, 1984. The complainant received Workers' Compensation Benefits from January 25, 1984 until her return to work on May 14, 1984. The complainant had a recurrence of her original injury on May 18, 1984 and received Workers' Compensation Benefits until her return to work on December 9, 1985. The parties agree that the complainant's injury constitutes a handicap under the Code.

3. The complainant's seniority was amended pursuant to the Collective Agreement between Emerson Electric Canada Ltd. Motor Division and United Electrical, Radio and Machine Workers of Canada and its Local 522 dated November 1, 1982 to October 31, 1984. Section 17.08 reads as follows:

> ...An employee shall cease accumulating seniority under the following circumstances:
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> (a) absence with permission for more than one year;
> (b) absence due to personal illness or accident for more than year...

The complainant's seniority was adjusted to commence December 10, 1969 in accordance with section 17.08(b). The complainant was advised of this change to her start date by letter dated March 12, 1986.

4. The position of Tool Crib Attendant was posted on March 19, 1990. The complainant entered an internal competition for the position. The complainant was one of two finalists. The complainant and the other worker were of equal merit. Pursuant to section 17.03 of the Collective Agreement, the Company looked to the seniority list as the deciding factor in awarding the position. The worker had a seniority date of July 1969 and had been listed as the most senior employee for several years prior to the competition. The other worker was awarded the position of Tool Crib Attendant. The complainant would likely have been the successful candidate for the position had her

start date not been changed pursuant to section 17.08.

5. The complainant grieved the results of the competition on March 30, 1990.

6. The position of Tool Crib Attendant was eliminated in September 1990 and the incumbent worker was placed back into another job in production.

7. As of November 1, 1989, the complainant was earning Labour Grade 7 at $9.71 per hour as a Quality Control Inspector. The rate for a Tool Crib Attendant was $9.44 to $10.04 per hour.

Commission counsel put in no further evidence.

Peter Morris, Human Resources Manager for the Respondent Company stated that Article 17.08 of the Collective Agreement had been in the Agreement since 1972. The reason for the Article in the Collective Agreement was that it provides incentives to employees to come back to work. Mr. Morris testified that the Company felt that they had no authority to conclude that they had discriminated against Ms. Thorne when they changed her seniority date and later denied her the position of Tool Crib Attendant in March 1990. He said the Company was concerned that if they made an exception for Ms. Thorne it would appear as preferential treatment since Ms. Thorne is a shop steward in the Union. He also stated that the Union was not willing to change the Article or the effect of the Article.

On cross-examination Mr. Morris clarified his evidence to state that Article 17.08 was to encourage people to come back to work rather than being a cost saving measure. He stated that this clause affected all absences and not just those due to illness. Further evidence given by this witness indicated that the Company wants to be in compliance with the law. He stated that he did not think a decision that the clause was discriminatory would have a large impact but at the time the Company was not sure how to deal

with the other people who were affected by the change in seniority of Ms. Thorne.

Decision

Ms. Thorne claims to have been discriminated against because of handicap in contravention of Section 5(1), 9 and 11 of the Human Rights Code R.S.O. 1990 C.H. 19 (the "Code"). In order to prove her case she must prove that she was handicapped and that the provision in the Collective Agreement discriminated against her because of her handicap.

Section 5 (1) of the Code provides:

> "every person has right to equal treatment with respect to employment without discrimination because of... handicap."

Section 10 (1)(b) defines "because of handicap" as including:

> "(v) an injury or disability for which benefits were claimed or received under The Workers' Compensation Act."

The parties agreed in their Statement of Facts that the complainant's injury constitutes a handicap under the Code.

The evidence shows that the complainant sustained an injury at work in January of 1984 for which she received Workers' Compensation benefits until her return to work on May 14, 1984. Several days after returning to work she had a recurrence of the original injury and went back on Workers' Compensation benefits until she returned to work December 9, 1985. From May 18, 1984 to December 9, 1985 the complainant was away from work for approximately one year and a half. Thus I find that Ms. Thorne was handicapped because she was receiving Workers' Compensation benefits during her one and a half year absence.

In accordance with Article 17.08 of the Collective Agreement her seniority was adjusted by approximately six months so it was as if she had started six months later than she in fact really had. Article 17.08 of the Collective Agreement states as follows:

> "an employee shall cease accumulating seniority under the following circumstances:
> a) absence with permission for more than one year;
> b) absence due to personal illness or accident for more than one year...

As the evidence indicates this clause applies to any employee who is absent for more than one year. Thus an employee taking a leave of absence to retrain for two years would lose one year of seniority.

The provision in the Collective Agreement is neutral on its face, that is, it does not state that if someone is handicapped for more than a year that person will lose seniority depending on time away. Thus, Commission counsel argues that this is a case of constructive or adverse discrimination.

Constructive discrimination is prohibited by Section 11 of the Code which provides as follows:

> "(1) A right of a person under Part 1 is infringed where requirement, qualification or factor that exists is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
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> (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or,
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> (b) it is declared in this Act other than in Section 16 that to discriminate because of such ground is not an infringement of a right."

Section 11 of the Code thus prohibits unintentional discrimination. O'Malley v Simpson Sears (1980), 2 C.H.R.R. D/267, affirmed (1982), 36 O.R. (2d) 59 (Div. Ct.), affirmed (1982), 38 O.R. (2d) 423 (C.A.), reversed (1985) 7 C.H.R.R. D/3102 outlines what must be proven to establish a prima facie case of constructive discrimination. In that case, the Supreme Court held that constructive discrimination occurs:

> "where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the workforce." (para. 24772)

Although this case was decided before the amendment to Section 11 in 1986 by the Equality Rights Statute Law Amendment Act Judith Keene in Human Rights in Ontario points out that the elements necessary to prove a prima facie case are changed only in a relatively minor way by the statutory amendment. Thus, what needs to be proven for a case of constructive discrimination is evidence that:

1. a requirement, qualification or factor in itself not discriminatory on a prohibited ground does exist;

2. the existence of this requirement, qualification or factor adversely affects a person or group of persons identified by a prohibited ground of discrimination; and

3. the complainant as a member of the protected group has been adversely affected by the requirement, qualification or factor. (See J. Keene p. 126)

A review of the jurisprudence in this area indicates that there are no reported decisions in Ontario concerning constructive discrimination on the ground of handicap. However, constructive discrimination has been found when dress or uniform codes have forbidden turbans or beards and also when work schedules have

required work on a Saturday sabbath. Singh v. Workmen's Compensation Board (1981), 2 C.H.R.R. D/459 (Ont. B.O.I.); O'Malley v. Simpson Sears; Gohm v. Domtar Inc. These are all cases where the requirement was neutral on its face but adversely affected a particular protected group.

I therefore find that Ms. Thorne, being a member of a specific class which is protected under the Code, handicapped in this case, was adversely affected by the provision in the Collective Agreement in that she lost six months of seniority because she was handicapped. Although the provision in the Collective Agreement is neutral on its face it discriminates against anyone qualifying as handicapped, absent from work for more than one year as a result of that handicap.

Furthermore, it is clear that parties are not permitted to contract out of the provisions of the Code. In Ontario Human Rights Commission, et al v The Borough of Etobicoke (1982) 3 C.H.R.R. D/781 the Supreme Court of Canada ruled in a unanimous decision that an early mandatory retirement age agreed upon in the terms of the Collective Agreement with the Union was contrary to the Code. McIntyre J. said:

> "Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy." (at Para. 6905)

This is a case where the provision in the Collective Agreement was found to be discriminatory and the Supreme Court of Canada clearly held that such clauses were not protected by being in a Collective Agreement. In the case before me the provision is neutral on its face but adversely affects anyone handicapped absent for more than

a year because of that handicap. Therefore, it is not protected by being in a Collective Agreement.

Once a prima facie case of constructive discrimination has been established, the onus of establishing a defence falls on the Respondent. Subsections 11(1)(a) and (b) of the Code provide that:

> "(a) The requirement, qualification or factor is reasonable and bona fide in the circumstances; or
>
> (b) It is declared in this Act, other than in Section 11, that to discriminate because of such ground is not an infringement of a right."

A review of the case law indicates that should a Respondent establish a defence under Subsection 11(1)(a) then Subsection 11(2) of the Code applies:

> "the Commission, a Board of Inquiry or a Court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any."

The only evidence that I heard to support the finding of the defence under Section 11(1)(a) was that the purpose of the Article in the Collective Agreement was to encourage people to come back to work. Respondent's counsel argued that the Union's unwillingness to change the Collective Agreement, the Company's concern for potential grievances, the effect on morale on its other workers, in addition to the difficulty of making the change after so many years have passed, all amounted to undue hardship. However, the evidence of the Respondent's only witness was also that a finding that the Article in the Collective Agreement was discriminatory would not have a major effect on the Company. His

evidence was that the Company was unsure as to how to proceed and was concerned with appearing to favour Ms. Thorne. In Janssen v Ontario (Milk Marketing Board) the Board discussing what counts as hardship noted that:

> "balancing undue hardship against the importance of freedom of religion is a difficult equation, and neither Courts nor tribunals have a great deal of experience interpreting the specific meaning of the phrase. The Concise Oxford Dictionary defines 'hardship' as "severe suffering or privation" and 'undue' as "excessive, disproportionate"."

The decision goes on to say:

> "Although the Code does not require that any individual or group accommodate others to the point of undue hardship, severe suffering or disproportionate privation, it does conceive of inconvenience, and some degree of disruption and expense."

I am of the view that there was insufficient evidence to support a defence based on undue hardship. The Company could have accommodated Ms. Thorne's handicap in this case by rectifying her seniority date and either promoting her to a comparable job or paying her suitable compensation. This may have been inconvenient and required some expense, however, it would not amount to undue hardship.

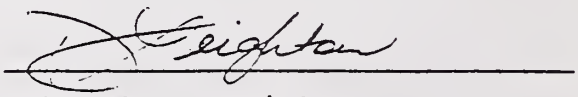
Although the Union did not put in any evidence, the uncontroverted testimony of the Respondent Company was that the Union did not want to change the effect of the clause. Thus, there is no evidence that the Union made any effort to accommodate Ms. Thorne. Since the law in this area indicates that if a provision in a Collective Agreement is discriminatory, then the Union is also liable, I find that the Union in this case is also in breach of the Code, by failing to accommodate. See Office and Professional Employees International Union, Local 267 v. Domtar Inc. and O.H.R.C. (1992) 8 O.R. (3d) 65.

Given the reasons noted above, I find that the Respondents are in breach of Sections 5 (1) and 11 of the Code. Counsel for the Respondent and the Commission asked me at the outset of the Hearing to adjudicate only on the liability issue. They agreed that I would retain jurisdiction over the matter until they were able to submit Minutes of Settlement regarding damages. Thus, I make this an Order on liability and await the Minutes of Settlement on damages. If the parties are not able to reach Minutes of Settlement on damages, the parties agreed to make written or oral submissions to me.

Order

The Respondents, Emerson Electric Canada Ltd. and the United Electrical, Radio and Machine Workers of Canada, Local 522, are found to be in violation of Section 5(1) and Section 11 of the Ontario Human Rights Code R.S.O. 1990 C.H. 19. I will retain jurisdiction over this matter until a final Order can be made regarding damages.

Dated at Kingston this 26th day of February, 1993.



Deborah J. Leighton
Board of Inquiry